IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5521

SYLVIA SCOTT WHITLOW,

Petitioner,

v.—

F. E. HODGES, Director, Division of Driver Licensing, Department of Public Safety of the Commonwealth of Kentucky,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 23, 1976.

OPINIONS BELOW

The July 23, 1976 opinion of the Court of Appeals for the Sixth Circuit is not yet reported; it is set out in the Appendix, infra, at 1-A. The January 17, 1975 opinion of the Court of Appeals rendered when the case was first before it is not reported; it is set out in the Appendix, infra, at 17-A. Neither of the two opinions rendered by District Court for the Eastern District of Kentucky was reported; both are set out in the Appendix, infra, at 9-A and 22-A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered July 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV

" . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether a state may constitutionally require that a married woman who has not adopted her husband's surname as her own for any social or legal purpose, receive a driver's license in his surname, unless and until she has obtained a court order "changing" her name to the name she in fact uses.

STATEMENT OF THE CASE

The petitioner, plaintiff below, is an instructor at the University of Kentucky's School of Journalism. Throughout her life she has been known by the name Sylvia Scott Whitlow. She continued to use that name for all purposes following her marriage to Norman Van Tubergen in Lexington, Kentucky on December 20, 1973.

An unwritten regulation, promulgated by the Kentucky Division of Driver Licensing, of which the respondent is the present Director, requires that a married woman apply for and receive a driver's license in the surname of her husband whether or not she has adopted his surname as her own. Pursuant to this regulation, the petitioner was informed by the appropriate state officials that she could not apply for a driver's license in the name Sylvia Scott Whitlow. Because Sylvia Scott Whitlow was unwilling to apply for a driver's license in a name other than her own, she has been unable to obtain a Kentucky driver's license.

On April 15, 1974, petitioner instituted a class action in the United States District Court for the Eastern District of Kentucky, challenging on due process and equal protection grounds the unwritten regulation in question. On May 6, 1974, the District Court entered a one-line order dismissing the complaint on the authority of Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), aff'd mem., 405 U.S. 970 (1972).

Petitioner took a timely appeal to the United States Court of Appeals for the Sixth Circuit, which, on January 17, 1975, entered an order vacating the judgment of the District Court and remanding the case for a determination, inter alia, whether "Kentucky law allows a married woman to retain her maiden name as her legal name." Appendix, infra, at 19-A. On February 14, 1975, the District Court again dismissed the complaint, this time issuing a memorandum 1) declaring Kentucky law required a married woman to change her surname to that of her husband, and 2) reasserting reliance on Forbush.

Petitioner again appealed, and on July 23, 1976, the Sixth Circuit affirmed the dismissal order, this time holding that Forbush controlled even if the District Court misread Kentucky law. The majority below reasoned that whether or not Kentucky law required a married woman to change her surname to that of her husband for any or all purposes, Forbush impelled rejection of Sylvia Scott Whitlow's claim. The Forbush summary affirmance, and the "convenience" rationale of the Forbush three-judge federal district court, sufficed to uphold the Division of Driver Licensing's unwritten requirement that a

married woman apply for and receive a driver's license in the surname of her husband unless and until she has obtained a court-ordered name change, "restoring" her own name.[1] Judge McCree dissented on the ground that "[the court] cannot determine whether this case is governed by Forbush . . . unless [it] first determine[s] whether . . . Kentucky . . . requires a married woman to adopt her husband's surname." Appendix, infra, at 5-A.

REASONS FOR GRANTING THE WRIT

I.

The decision below, upholding an unwritten state regulation requiring a married woman who has not adopted her husband's surname as her own, to obtain her driver's license in her husband's surname, rendered under the compulsion of this Court's summary disposition in *Forbush v. Wallace*, 405 U.S. 970 (1972), conflicts with the Court's subsequent plenary decisions from *Frontiero v. Richardson*, 411 U.S. 677 (1973), through *Stanton v. Stanton*, 421 U.S. 7 (1975).

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[1] The court noted that Ky. Rev. Stat. 401.010 "affords a simple and inexpensive means of changing one's name."

The Sixth Circuit concluded that Forbush was "on all fours with the instant case." Under the compulsion of Forbush, Hicks v. Miranda, 422 U.S. 332 (1975), it sustained the constitutionality of the state regulation in question.

In Forbush, this Court, without hearing argument and without opinion, summarily affirmed the decision of a three-judge federal district court holding constitutional Alabama's requirement that a married woman use her husband's surname for such official purposes as obtaining a driver's license, unless and until she successfully petitions for a court-ordered name change. In the instant case, petitioner argued below that the three-judge district court holding and rationale in Forbush could not survive measurement against subsequent plenary decisions of this Court assessing the constitutionality of sex-based discrimination. E.g., Frontiero v. Richardson, supra; Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanton v. Stanton, supra. Petitioner's argument was rejected by the Sixth Circuit on the ground that reappraisal of Forbush in light of this Court's recent, fully-reasoned decisions was not a course open to a lower court. For the nation's tribunals are bound by Supreme Court summary dispositions "until such time as th[is] Court informs [them] that [they] are not." Hicks v. Miranda, supra, 422 U.S. at 344-45.

It is petitioner's position that: 1) Forbush stands in glaring conflict with the Court's current, vibrant precedent; 2) absent certiorari to determine the continuing

vitality of Forbush, lower courts will remain under constraint to follow outgrown dogma and avoid reasoned decision.

Precedent developed subsequent to Forbush displays sensitivity to the reality that "[o]ld accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed." Green v. Waterford Board of Education, 473 F.2d 629, 634 (2d Cir. 1973). The regulation here at issue is a clear example of such a rule or custom.

This Court's very recent course of decision casts a heavy cloud of unconstitutionality over a state's insistence that a wife take her husband's surname as her own for any purpose. While it may be "more irrational" for a state to require the wife to use her husband's surname for some purposes (e.g., obtaining a driver's license) but not others (e.g., voting) than it is to require her to use his surname for all purposes, no official compulsion to use a husband's surname relates fairly and substantially to the advancement of a legitimate state interest, as that concept has been defined by this Court in Frontiero and thereafter. Furthermore, no legitimate state interest conceivably can be served by requiring a person (male or female) to use a name for any purpose which is not the

name by which that person is otherwise known.[2]

In the view of the Sixth Circuit's majority, however, it made no difference whether or not Kentucky law required that a married woman take her husband's surname as her own for any purpose. The essential premise of Forbush, the majority below reasoned, was that "administrative convenience" justified a state agency's insistence that a married woman obtain a driver's license in her husband's surname. Frontiero makes it abundantly clear that the shibboleth "administrative convenience" can no longer be relied upon to salvage

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[2] The "uniformity" rationale of Forbush, premised on the existence of a so-called "common law rule" requiring a woman to change her name to that of her husband, has been obliterated by the dozens of state court decisions and attorney-general opinions rendered since March 1972 upholding the right of married women to the surnames of their choice. See, e.g., In re Reben, 342 A.2d 688 (Me. 1975); Stuart v. Board of Supervisors of Elections, 266 Md. 440, 295 A.2d 223 (1972); Dunn v. Palermo, 522 S.W.2d 679 (Tenn. 1975); In re Strikwerda, 216 Va. 470 220 S.E.2d 245 (1975); Kruzel v. Podell, 67 Wis.2d 138, 226 N.W.2d 458 (1975); Custer v. Bonadies, 30 Conn.Sup. 387, 318 A.2d 639 (1974); Davis v. Roos, 326 So.2d 226 (Fla.App. 1975); In re Mohlman, 26 N.C.App. 220, 216 S.E.2d 147 (1975); Application of Lawrence, 133 N.J.Super. 408, 337 A.2d 49 (1975); Cal. Op. Att'y Gen., March 12, 1974; Ill. Op. Att'y Gen., No. S-711, Feb. 25, 1974; Pa. Op. Att'y Gen., No. 72, Oct. 25, 1973.

rank sex-based discrimination. In any event, it is impossible to discern how the objective "administrative convenience" is advanced by a requirement that a person obtain a driver's license in a name she does not use for any other purpose.

Nor can the sex discriminatory practice at bar be sustained on the basis of "old notions" relating to the supremacy of the husband and the dependent role of the wife in the marriage relationship. Stanton v. Stanton, supra; Weinberger v. Wiesenfeld, supra. The arbitrariness of the discrimination is not mitigated by the "opportunity" the woman has to achieve "restoration" of her own name by a court-ordered name change, for there is no legitimate state interest in requiring her to take her husband's surname as her own in the first place. Indeed, the fact that by pro forma court order she can be "restored" to the name she uses underscores the irrationality of requiring her to take her husband's surname at all. By providing for judicial "restoration" of the married woman's own name, the state declares that it has no policy requiring married persons to have the same surname.[3]

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[3] It should be noted that statutes referring to "changes of name at marriage" do not reflect a requirement that married couples must bear a common surname. See, e.g., Kruzel v. Podell, supra, 67 Wis.2d at 154, 226 N.W. 2d at 466.

In sum, the impact of Forbush, as reflected in the Sixth Circuit majority's decision in the case at bar, is that even if state law otherwise does not require a married woman to change her surname to that of her husband, a state agency may constitutionally impose such a requirement on a married woman for a particular purpose, e.g., the issuance of a driver's license, although the woman is known by her own name for all other purposes. "If this be rational, nothing is irrational!" Struck v. Secretary of Defense, 460 F.2d 1372, 1379(1972) (Duniway, J. dissenting opinion). Certiorari should be granted so that this Court can determine authoritatively the validity of any state-imposed requirement that a married woman change her surname to that of her husband for any purpose.

II.

Certiorari should be granted to determine whether the summary disposition in *Forbush v. Wallace*, 405 U.S. 970 (1972), which has never been cited as precedent by this Court, but by which the lower federal courts are bound "until such time as this Court informs [them] that [they] are not," retains vitality in light of subsequent plenary decisions invalidating arbitrary official line drawing by gender.

Certiorari should be granted in the case at bar to instruct the nation's lower courts whether the Forbush summary affirmance, rendered without hearing argument and without opinion, reflects this Court's current view of the controlling constitutional principle. As pointed out previously, the "administrative convenience" rationale proffered by the three-judge federal district court in Forbush is plainly inconsistent with this Court's judgment in Frontiero. Moreover, the Court's path-marking decisions from Frontiero through Stanton signal that the discrimination involved in Forbush and the case at bar can no longer be written off as an issue unworthy of careful constitutional scrutiny.

Given this Court's stern admonition in Hicks v. Miranda, 422 U.S. 332, 344-345 (1975), concerning the binding effect of summary dispositions, the Sixth Circuit's solid and sole reliance on Forbush is understandable. While summary affirmances are unquestionably dispositions on the merits, Hicks v. Miranda, supra, they are of limited precedential value in this Court. Edelman v. Jordan, 415 U.S. 651, 671 (1974). With the recent repeal of the three-judge court act, 28 U.S.C. §§2281-2284, and its concomitant authorization of direct appeal to this Court under 28 U.S.C. §1253, the incidence of summary affirmance is likely to decrease markedly. This significant change in the burden of direct appeals should impel close review of prior summary dispositions in three-judge district court cases, particularly in an area such as the constitutional validity of sex-based

classification, where the law has evolved rapidly within the space of a few years.

The pattern of this Court's gender-based discrimination decisions makes it abundantly clear that irrational and arbitrary sex-based classification cannot be squared with the commands of the Constitution. But the summary disposition in Forbush blocks application of the Court's recent and reasoned precedent to the right of a married woman to choose her own name. Instead, Forbush reinforces "old notions" about male supremacy and the dominance of the husband in this area, an area of vital concern to women.[4] The sweeping impact of Forbush on the right of a married woman to decide the name by which she will be known, as starkly demonstrated by the Sixth Circuit's decision in the case at bar, furnishes a compelling reason for the grant of certiorari and the authoritative determination by this Court of the present vitality of that summary decision.

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[4] See generally Center for a Woman's Own Name, For Women Who Wish to Determine Their Own Names After Marriage (1974).

Conclusion

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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APPENDIX

No. 75-1519

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SYLVIA SCOTT WHITLOW, *Plaintiff-Appellant,* v. F. E. HODGES, Director, Division of Driver Licensing, Department of Public Safety of the Commonwealth of Kentucky, *Defendant-Appellee.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed July 23, 1976.

Before: McCREE, LIVELY and ENGEL, Circuit Judges.

ENGEL, J., delivered the opinion of the Court, in which LIVELY, J., joined. McCREE, J., (pp. 5-8) filed a dissenting opinion.

ENGEL, Circuit Judge. At issue in this appeal is whether the Commonwealth of Kentucky may constitutionally require a married woman to make application for and receive a motor vehicle operator's license in the surname of her husband despite a showing that for all other purposes the woman has continued to use her maiden name. Plaintiff's complaint alleges that defendant's policy violates her civil rights under the due process and equal protection clauses of the Fourteenth Amendment. She seeks relief under 42 U.S.C. § 1983, premising federal jurisdiction upon 28 U.S.C. § 1343.

By brief order, the late District Judge Mac Swinford dismissed the complaint relying wholly upon *Forbush* v. *Wallace*, 341 F. Supp. 217 (M.D.Ala. 1971), a three-judge district court ruling, *affirmed* without opinion by the Supreme Court at 405 U.S. 970 (1972). The court in *Forbush* denied the same claim now being urged by plaintiff in the instant case.

Upon appeal, this court entered an order remanding the cause to the district court primarily to permit an inquiry into whether Kentucky law allows a married woman to retain her maiden name as her legal name, indicating that if the district court should find that Kentucky law, like that of Alabama, requires a woman to take her husband's surname upon marriage, then a three-judge court would not be required under 28 U.S.C. § 2281, as the result would be clearly compelled by the affirmance of *Forbush*. *Bailey* v. *Patterson*, 369 U.S. 31 (1962). Upon remand, Chief District Judge Bernard T. Moynahan, Jr. reached the conclusion that under the common law of Kentucky, a woman upon marriage abandons her maiden name and assmues her husband's surname. The district judge accordingly determined that the two cases were identical and once more entered an order of dismissal of the complaint. In this posture the case was again appealed to this court.

In this appeal, most of the briefing of the parties and the attention of the court was directed to whether the district judge was correct in his interpretation of the Kentucky common law. Upon further reflection we have concluded that notwithstanding our original concern in remanding, we need not determine with finality that the challenged regulation is consistent with the common law of Kentucky, a question which we believe upon the existing state of the law in Kentucky is better left to more definite resolution by the courts of Kentucky. Instead, while *Forbush* is no doubt reinforced by such a finding under the common law of Alabama, we read its

primary thrust as directed to the question of whether the challenged regulation has a rational connection with a legitimate state interest. *Forbush, supra*, at 222. Thus the concern in *Forbush*, and ours here, is whether the conduct complained of abridges plaintiff's rights under the Constitution of the United States. If the challenged conduct is under color of state law, " . . . inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power." *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278, 287 (1913); *Accord, Monroe* v. *Pape*, 365 U.S. 167 (1961); *Daniel* v. *Waters*, 515 F. 2d 485, 488 (6th Cir. 1975).

So viewed, we find *Forbush* on all fours with the instant case. Here precisely as in *Forbush*, an unwritten regulation is challenged. The rationale of *Forbush* can be applied equally here and without variation. Kentucky law, like that of Alabama, affords a simple and inexpensive means of changing one's name. *Winkenhofer* v. *Griffin*, 511 S.W. 2d 216 (Ky. 1974); Kentucky Revised Statutes, KRS § 401.010, as amended (1974).*

Plaintiff argues that this court should feel free to depart from the Supreme Court's summary affirmance of *Forbush*, and quotes Justice Rehnquist's comments in *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974) that "[summary affirmances] are not of the same precedential value as would be an opinion of this Court treating the question on the merits". We might be inclined to agree with plaintiff, see *Jordan* v. *Gilligan*, 500 F. 2d 701, 707 (6th Cir. 1974), *cert. denied* 421 U.S. 991 (1975), were it not for the recent pronouncements on the precedential value of Supreme Court summary actions in *Hicks* v. *Miranda*, 422 U.S. 332 (1975). The Court in *Hicks* rejected a three-judge district court's conclusion that it was not

* Significantly KRS § 401.010 was amended in 1974 by deleting an exception to the name change statute in the case of married women.

bound by a Supreme Court dismissal of a judgment of a California court "for want of a substantial federal question". The California court had sustained the constitutionality of the same obscenity statute which the three-judge court later decided was unconstitutional. The Supreme Court stated that the district court should have followed the Second Circuit's advice in *Doe* v. *Hodgson*, 478 F. 2d 537, 539 (2nd Cir.), *cert. denied*, 414 U.S. 1096 (1973), that the "lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not'." *Hicks* v. *Miranda*, 422 U.S. at 344-345.

Accordingly, this court deems itself bound by the Supreme Court affirmance in *Forbush* v. *Wallace, supra.*

Affirmed.

McCree, Circuit Judge (Dissenting). I respectfully dissent. We cannot determine whether this case is governed by *Forbush* v. *Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd* 405 U.S. 970 (1972), unless we first determine whether the common law of Kentucky, like that of Alabama, requires a married woman to adopt her husband's surname.

This requirement of the Alabama common law is the cornerstone of the *Forbush* opinion. The court stated:

> We may commence our analysis of the merits of the controversy by noting that Alabama has adopted the common law rule that upon marriage the wife by operation of law takes the husband's surname. Roberts v. Grayson, 233 Ala. 658, 660, 173 So. 38 (1937); Bentley v. State, 37 Ala.App. 463, 465, 70 So.2d 430 (1954). Apparently, in an effort to police its administration of the issuance of licenses and to preserve the integrity of the license as a means of identification, the Department of Public Safety has required that each driver obtain his license in his "legal name." Thus, in conformity with the common law rule, the regulation under attack requires that a married woman obtain her license in her husband's surname.
> 341 F.Supp. 221.

Proceeding from this premise, the court held that the regulation was "reasonable" and not violative of equal protection. The court also determined that the underlying state common law rule that a wife must adopt her husband's surname did not violate equal protection, since it was based upon "a tradition extending back into the heritage of most western civilizations," and upon a custom common to all 50 states. Further, the court indicated that this was an area where uniformity among the states is important. Finally, the court added to its analysis of both the regulation and the common law rule the observation that because the state provided a simple and inexpensive procedure for name changes, any injury suffered by plaintiff's class was *de minimus* compared with

the administrative difficulties that the state would experience should the regulation be invalidated.

As this analysis of *Forbush* demonstrates, its result is bottomed on the settled state of the common law of Alabama. Accordingly, our case can be governed by *Forbush* if and only if Kentucky, like Alabama, clearly requires a married woman to adopt her husband's surname.

The cases are alike in respect that Kentucky, like Alabama, requires a driver to obtain a license in his legal name. However, the majority opinion does not determine whether the district court was correct in holding that Kentucky, like Alabama, also had a common law rule requiring a married woman to adopt her husband's surname. Instead, it expressly leaves this question open, stating that it "is better left to more definite resolution by the courts of Kentucky." Accordingly, it acknowledges the possibility that Kentucky law does *not* require a married woman to adopt her husband's surname, and that, as plaintiff alleged in her complaint, there is a class of married women too numerous to be joined in this action who, as was their right under state law, did not adopt their husband's surnames and have always been known only by their former names. Mistakenly following *Forbush*, the majority opinion would hold that Kentucky, which requires a driver to be licensed in his legal name, can rationally require persons in plaintiff's class to be issued licenses in names which under state law are *not* their legal names and by which they have never been known. Accordingly, the state interests found to be determinative in *Forbush*, the effective administration of the issuance of licenses and the preservation of the integrity of licenses as a means of identification, cannot possibly be served by requiring a class of drivers to be issued licenses in names which are not their legal names, and by which they are not and have never been known. It seems equally clear that *Forbush*, which depends upon a rational justification, does not compel such a result.

It is therefore essential in this case, as in *Forbush*, to begin analysis by determining whether Kentucky has a common law (or statutory) rule that requires a woman to adopt her husband's surname when she marries. I do not disagree with the general proposition stated in the majority opinion that conduct under color of state law can violate constitutional rights even if it is not authorized by the state. This statement is applicable where the conduct of a person acting under color of state law violates a specific constitutional prohibition, such as the Fourth Amendment prohibition against unreasonable searches and seizures. The equal protection clause, however, does not prohibit a specific practice, but instead prohibits any action that denies the equal protection of the law. By interpretation, the equal protection clause requires that there be a rational connection between a challenged state rule or classification, on the one hand, and a legitimate state interest that it serves, on the other. It is thus essential to determine what classification or rule the state applies and what state interest is to be benefited in order to determine the rationality of the relationship between the two.

Accordingly, I cannot agree with the majority opinion that we can assess the rationality of the state licensing regulation without first determining whether it is (1) a rule that requires married women to hold drivers licenses in their legal names — even if they disagree with the state rule that makes their husbands' surnames their legal names (*Forbush*), or (2) (as plaintiff asserts) a rule that requires persons in plaintiff's class to be issued licenses in names that under state law are *not* their legal names and by which they have never been known.

The majority opinion suggests that we should decline to decide the state law question, and the parties disagree whether the Kentucky rule is the same as that of Alabama. If a majority of the court believe that this is a proper case for abstention, then I think that we should so state forthrightly,

and remit plaintiff to the state courts. If not, I think we must first determine what is the law of Kentucky, and then assess its compliance with the constitutional requirements of the equal protection clause.

MEMORANDUM OPINION OF THE DISTRICT COURT
Filed February 14, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL NO. 74-7

PLAINTIFF

SYLVIA SCOTT WHITLOW

v.

F.E. HODGES, DIRECTOR
DIVISION OF DRIVER LICENSING

DEFENDANT

MEMORANDUM

This civil rights action attacks directives of the Kentucky Division of Driver Licensing requiring married women to make application for motor vehicle operator's licenses in the husband's surname. The complaint alleges that the regulations are arbitrary and unreasonable and constitute an impermissible sex-

based discrimination. On May 6, 1974, the action was dismissed in an order citing Forbush v. Wallace, M.D. Ala., 341 F. Supp. 217 (1971) aff'd 405 U.S. 970 (1972). An appeal was taken and on January 17, 1975, the Sixth Circuit Court of Appeals vacated and remanded for resolution of the following issues:

> "(W)hether Kentucky law allows a married woman to retain her maiden name as her legal name, whether a woman applying for a motor vehicle license must do so in her legal name, and whether the instruction of the Director complies with these laws .... If the district court should determine that Kentucky law, like Alabama law, requires a woman to take her husband's surname upon marriage, then a three-judge court is not required. Bailey v. Patterson, 369 U.S. 31 (1962)."

The plaintiff admits the non-existence of a Kentucky statute or ruling adjudicating the primary issue presented by the Court of Appeals but argues that the common law as adopted by the Commonwealth does not require a married woman to assume her husband's surname. The court agrees that the absence of statutory or judicial authority on this issue results in the application of general common law:

> "Kentucky is a common law State. Our common law originated as an English institution evolved from local rules and customs which were in time recognized by the King's Court. That great mass of law has been accepted as part of the general law of almost every State of the Union.
>
> * * * * * * *
>
> It has long been accepted ... that the common law prevails unless changed by our constitution or statutes." Pryor v.

Thomas, Ky., 361 S.W.2d 279, 280 (1962), cert. denied 372 U.S. 922 (1963). Kentucky Constitution, Section 233; Miller v. Scott, Ky., 339 S.W.2d 941 (1960); Commonwealth v. Donoghue, 250 Ky. 343 (1933). However, the contention that a married woman is not required to assume the surname of her husband is supported by no applicable authority and would appear to conflict with the common law rules merging the wife's legal identity with that of her husband:

> "The common law devised a scheme that made for unity in the marriage relations of husband and wife. To secure this unity, the law proceeded upon the theory or assumption that the wife's legal existence was, in virtue of the marriage, suspended or extinguished during the marriage state. The very legal being and existence of the woman was suspended during coverture, or entirely merged or incorporated

> in that of the husband .... The husband lost nothing by the marriage, but the wife surrendered her property to him, and lost her independence and identity in law." Palmer v. Turner, 241 Ky. 322, 324 (1931).

Although not addressing the issue presented in the case at bar, the Palmer decision is in clear accord with the "common-law principles and immemorial custom that a woman upon marriage abandons her maiden name and assumes the husband's surname." 57 AM.Jur.2d "Name", Section 9; Accord, People v. Lipsky, 327 Ill. App. 63, 63 N.E.2d 642, 644 (1945).

The conclusion that the applicable law requires a married woman to assume her husband's surname renders this action susceptible to the Forbush v. Wallace

holding, negates the necessity of addressing the other issues raised, and seemingly complies with the January 17, 1975 , order of the Court of Appeals.

February 14, 1975

United States District Judge

ORDER OF THE DISTRICT COURT
DISMISSING COMPLAINT
Filed February 14, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

FRANKFORT

SYLVIA SCOTT WHITLOW PLAINTIFF

VS ORDER CIVIL NO. 74-7

F.E. HODGES, DIRECTOR DEFENDANT
DIVISION OF DRIVER LICENSING

* * * * * * *

In conformity with the mandate of the United States Court of Appeals for the Sixth Circuit issued on February 10, 1975, herein, and in conformity with the memorandum this day filed herein;

IT IS NOW THEREFORE ORDERED herein as follows:

(1) That the complaint herein be and the same is hereby dismissed.

(2) That this action be and the

same is hereby dismissed and stricken from the docket of this Court.

This the 14th day of February, 1975.

BERNARD T. MOYNAHAN, JR., JUDGE

ORDER OF THE COURT OF APPEALS
Filed January 17, 1975

NO. 74-1726

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SYLVIA SCOTT WHITLOW,

Plaintiff-Appellant

-vs- ORDER

F.E. HODGES, Director
Division of Driver Licensing,
Department of Public Safety of
The Commonwealth of Kentucky,

Defendant-Appellee

BEFORE: MC CREE, LIVELY, and ENGEL
Circuit Judges.

This is an appeal from an order dismissing a complaint under 42 U.S.C. § 1983, alleging, inter alia, that an instruction given by the Director, Division of Driver Licensing, Department of Public Safety of the Common-

wealth of Kentucky, that requires a married woman to apply for a driver's license in her husband's surname contravenes Kentucky law and violates the equal protection clause of the Fourteenth Amendment. In her complaint, appellant sought to enjoin the Director for refusing to issue a driver's license to her in her maiden name.

Without deciding the merits of the claimed infringement of constitutional rights, and observing that appellant asserts that the law of Kentucky permits a married woman to retain her maiden name as her legal name, unlike the law of Alabama construed in Forbush v.

Wallace, 341 F. Supp. 247 (M.D. Ala. 1971) aff'd summarily, 405 U.S. 970 (1972), we vacate the order of the district court and remand the case to permit a preliminary inquiry into whether Kentucky law allows a married woman to retain her maiden name as her legal name, whether a woman applying for a motor vehicle license must do so in her legal name, and whether the instruction of the Director complies with these laws for the purpose of determining whether a three-judge court, 28 U.S.C. §2281, should be convened. If the district court should determine that Kentucky law, like Alabama law, requires a woman to take her husband's surname upon marriage, then a three-judge court is not required. Bailey v. Patterson,

369 U.S. 31 (1962). If the district court should conclude that Kentucky permits a woman to retain her maiden name as her legal name and that Kentucky law requires an applicant to obtain a driver's license in his legal name, then it would again appear that a three-judge court is not required. If, on the other hand, the district court should conclude that Kentucky does not require a woman to adopt her husband's surname and that Kentucky does not require an applicant to obtain a driver's license in his legal name, then the district court should determine whether the instruction of the Director is "...an order made by an administrative board or commission acting under State statutes...." 28 U. S.C. §2281. In appropriate circumstances

the district court should also determine the propriety of maintaining this action as a class action.

Accordingly, the judgment is vacated and the cause is remanded for proceedings consistent with this order.

Entered by order of the court

_____

Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

No. 74-7, Civil Docket

PLAINTIFF

SYLVIA SCOTT WHITLOW

V.

F.E. HODGES, ETC. DEFENDANT

ORDER

The motion of the defendant to dismiss the complaint is sustained and the complaint is dismissed at the cost of the plaintiff. Forbush v. Wallace, 341 F. Supp. 217 (1971), affirmed 405 U.S. 970 (March 6, 1972).

MAC SWINFORD

Mac Swinford, Judge

May 6, 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-552

SYLVIA SCOTT WHITLOW . . . . . PETITIONER

V.

F. E. HODGES, DIRECTOR, DIVISION OF DRIVER LICENSING, DEPARTMENT OF TRANSPORTATION OF THE COMMONWEALTH OF KENTUCKY . . . . . RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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November 19, 1976

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OPINIONS BELOW

The July 23, 1976, opinion of the Court of Appeals for the Sixth Circuit (App. 1-A of Petition), is now reported at 539 F. 2d 582 (1976). The earlier opinions are correctly cited and may be found in Petitioner's Appendix, with which the Respondent agrees and hereby adopts.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 (1), the proper provision for review of a Circuit Court of Appeals judgment in a civil case on certiorari.

Although the question presented by the Petitioner is a proper question for this court to consider, such question has not been decided affirmatively by the Supreme Court of the Commonwealth of Kentucky, and Petitioner's proper remedy appears to be through the avenues of the state courts and from that court to this court. There being no determination as to what the common law of Kentucky is as to this question, Petitioner is premature in raising the constitutional issues as stated in her petition.

Although the Commonwealth does require that a person seek an operator's license in his legal name, no determination by the state's highest court has been made as to what a person's legal name may be. As was stated by Circuit Judge McCree in his dissenting opinion, 539 F. 2d at 584.

> "We cannot determine whether this case is governed by *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd* 405 U.S. 970 (1972), unless we determine whether the common law of Kentucky, like that of Alabama, requires a married woman to adopt her husband's surname."
>
> "(O)ur case can be governed by *Forbush* if and only if Kentucky, like Alabama, clearly requires a married woman to adopt her husband's surname."

at 585:

> "If a majority of the court believe that this is a proper case for abstention, then I think that we should so state forthrightly, and remit plaintiff to the state courts."

However, should this court determine, on the basis of the record herein, that Kentucky common law does, in fact, require that a woman upon marriage must take her husband's surname, the Court does have the appropriate appellate jurisdiction and all parties are properly before this Court, and all jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

WHETHER THE COMMONWEALTH OF KENTUCKY MAY CONSTITUTIONALLY REQUIRE A MARRIED WOMAN TO OBTAIN A MOTOR VEHICLE OPERATOR'S LICENSE IN THE SURNAME OF HER HUSBAND, UNLESS SHE CHANGES HER SURNAME BY A COURT ORDER PURSUANT TO KRS 401.010.

STATEMENT OF THE CASE

Petitioner's statement of the case, though not complete, is substantially correct. Additional material facts and circumstances bearing upon the Fourteenth Amendment issue relied upon by the Petitioner will be set out in the argument which follows:

ARGUMENT

THE COMMONWEALTH OF KENTUCKY MAY CONSTITUTIONALLY REQUIRE A MARRIED WOMAN TO OBTAIN A MOTOR VEHICLE OPERATOR'S LICENSE IN THE SURNAME OF HER HUSBAND, UNLESS SHE CHANGES HER SURNAME BY A COURT ORDER PURSUANT TO KRS 401.010.

Respondent, F. E. Hodges, the Director of the Division of Driver Licensing, of the Department of Transportation of the Commonwealth of Kentucky, has sought to enforce the statutory provision which requires a person to apply for, and receive, a motor vehicle operator's license in the legal and full name of that person, KRS 186.412. Pursuant to said statute, Respondent has instructed all circuit court clerks (those persons directly responsible for issuing the licenses), to ascertain the legal name of the person applying and issue the license of that person in the legal name. In the case of a married woman, it is the belief of Respondent that a married woman, after being united in a ceremony of marriage, takes the surname of the husband. KRS 401.010 makes provisions for a person, including a married woman since 1974, to change her legal name to any name that she may choose, and may thereby, obtain an operator's license in that new name by presenting a certified copy of the court order granting such name change.

Pursuant to KRS 186.412, Respondent has issued oral instructions which require that all operator's licenses issued to married women be in the surname of their husband unless a court order granting a name change is presented to the clerk at the time of the application for, or renewal of, the license. Respondent believes this action to be his legal duty under the common law of Kentucky, its statutory provisions, and the decisions of its courts.

The case of *Pryor v. Thomas*, Ky., 361 S.W. 2d 279 (1962), *cert. denied* 372 U.S. 922 (1963), details a very lengthy account of the beginnings of common law states, and more especially, what the common law of Kentucky was at the time of its statehood. In the *Pryor* case, *supra*, the Court said beginning at page 279:

> "Kentucky is a common law state. Our common law originated as an English institution evolved from local rules and customs which were in time recognized by the King's Court. That great mass of law has been accepted as part of the general law of almost every State of the Union.
>
> By an Act of the Virginia General Assembly of 1776 it was declared 'that the common law of England, all statutes or acts of parliament made in the aid of the common law prior to the fourth year of the reign of King James I, and which are general, and not local to that kingdom...shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of this colony.' (Citation omitted.)
>
> The fourth year of the reign of King James I was in the year 1607. On May 14, 1607, the first permanent English settlement in America was founded on Jamestown Island, in the James River, near the present city of Norfolk, Virginia. Apparently the General Assembly of Virginia considered this event to be an appropriate cut off date.
>
> Section 233 of our Constitution provides:
>
> 'All laws which, on the first day of June, one thousand seven hun-

> dred and ninety two, were in force in the state of Virginia, and which are of a general nature and not local to that state, and not repugnant to this Consitution, nor to the laws which have been enacted by the general assembly of this Commonwealth, shall be in force within this state until they shall be altered or repealed by the general assembly.'

It will be noted that the Act of the General Assembly of Virginia of 1776 accepted generally the common law as developed by the courts, but excluded statutes or acts made before 1607. However, KRS 447.040 has further limited the scope of our acceptance. It reads:

> 'The decisions of the Courts of Great Britian rendered since July 4, 1776, shall not be of binding authority in the courts of Kentucky.'

It has long been accepted by the bench and bar that the common law prevails unless changed by our constitution or statutes..."

Further, the Kentucky Supreme Court noted that,

> "In the absence of a national common law in this country, each state is left to determine the common law for itself, according to its particular needs and policies..."*Adams Bros. v. Clark*, 189 Ky. 279, 224 S.W. 1046, 1047 (1920).

It is further stated at 15A C.J.S., Common Law, § 16, page 73, that:

> "In determining the question as to what is the common law of any particular state regard must be had to its general policy, the usages sanctioned by its courts, and its statutes."

This agrees substantially with the statement found at 15A C.J.S. Common Law, § 10, page 49, which further states that:

> "Common practice has always made common law, and an unbroken custom of a state for more than one hundred years is part of the common law of the state."

These statements certainly support the theory that the common law of any jurisdiction is based upon the customs of that particular jurisdiction, and in the instant case, the particular jurisdiction is the Commonwealth of Kentucky and not Great Britain; nor the common law of any other state of the Union. Although Petitioner cited 19 *Halsbury's Laws of England* 829 (3d Ed., 1957) in reaching her arguments before the Court of Appeals, the quotation states that the practice of a woman adopting her husband's name, even though still done by custom in England, was never and has never been compelled by law. This citation appears to support the theory upon which all common law, and hence the common law of the Commonwealth of Kentucky, is based; and which theory is that the custom of the particular jurisdiction becomes the common law of that jurisdiction. Therefore, through custom, habit, and usage, the common law has developed and requires that upon marriage, the female adopts the surname of her husband upon the performance of the marriage ceremony. Section 27 of Chapter

205 of a legislative act of 1893 stated that:

> "If a wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of her husband as shall be deemed equitable, and be *restored* to the *name* she *bore before marriage* if she desires it." (Kentucky Statute 2122, emphasis added.)

This 1893 statute clearly indicates that it was the custom, and therefore the common law, that a woman upon marriage took the surname of her husband. Further, it will be noted in the case of *Rayburn v. Rayburn*, 300 Ky. 209, 187 S.W. 2d 804 (1945), which stated at page 806, that:

> "...It does not appear that there are any decisions directly involving the matter of granting to the wife a restoration of her maiden name when the husband has been granted a divorce. In the case of *Walden v. Walden*, 250 Ky. 379, 63 S.W. 2d 290, it is stated: While we have no power to reverse the decree of divorce, we may review the evidence for the purpose of determining whether the judgment in other respects was proper.
>
> We are inclined to believe that the restoration of a name may be as readily cared for under the phrase proper in other respects, as in the citation above, as a determination relative to alimony or settlement of property rights."

There are numerous Kentucky cases indicating that the custom, and, therefore, the common law, is that the married woman assumes the husband's surname upon performance of the ceremony of marriage. See *Phillips v. Phillips*, 307 Ky. 217, 210 S.W. 2d 756 (1948), and *Mitts v. Mitts*, 312 Ky.

854, 229 S.W. 2d 958 (1950).

The case of *Gross v. Helton*, Ky., 267 S.W. 2d 67 (1954), concerned the re-registration of married women and held at page 69 that:

> "Five married women who voted in the election were still registered under their maiden names in violation of KRS 117.640(2) which requires re-registration in such cases. Their votes were void for this reason." (KRS 117.640(2) was repealed in 1972 by the Kentucky General Assembly.)

Further, the Kentucky Supreme Court held in the case of *Terrell v. Terrell*, Ky., 352 S.W. 2d 195 (1961) at page 196, that:

> "Appellant urges that the Chancellor erroneously restored her maiden name. KRS 403.060(4) provides:
>
> 'If the wife obtaining a divorce so desires the court shall restore to her the name she bore before marriage.'
>
> Since the appellant did not seek a restoration of her former name we believe that the judgment should be reversed in this respect. Cf. *Rayburn v. Rayburn*, 300 Ky. 209, 187 S.W. 2d 804."

One can further find stated in 57 Am. Jur. 2d, Name, § 9, at page 281 that:

> "It is well settled by common law principles and

> immemorial custom that a woman upon marriage abandons her maiden name and assumes the husband's surname."

Thus, it becomes readily obvious that the common law of Kentucky, like that of Alabama, through custom, immemorial habit, and regular usage, requires that upon the performance of the ceremony of marriage, the woman adopts the surname of the husband as her own surname, and which is the surname for all succeeding offspring of such marriage.

Although such an unyielding rule may well appear unfair to females who are in the position of the Petitioner, that position is not unchangeable, (as is usually the situation in "equal protection" cases). In most of those decisions cited by Petitioner, those persons had no alternative remedies and were faced with economic discrimination, but the Petitioner has an opportunity to avoid this discrimination. In 1974, the General Assembly of the Commonwealth of Kentucky amended KRS 401.010 to allow *all* persons, married or unmarried, male or female, white or non-white, and regardless of their religious affiliation, to petitition the county court of the county in which that person resides and thereby obtain a legal name change, which would allow either name to be changed to any other name that the petitioner may desire. Any time a choice is made, some selection of alternatives must result; but Respondent believes this selection is not of that type recently struck down by this court in its plenary decisions since *Forbush v. Wallace, supra,* was decided.

The Petitioner cites the case of *Green v. Waterford Board of Education*, 473 F. 2d 629, 634 (2d Cir. 1973), and quotes from the case to explain that these

> "Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed."

The Respondent would further point this Court's attention to the fact that the petitioner in that case, Priscilla B. Green, was a pregnant school teacher who had been forced to leave her job, and which unemployment caused a great economic hardship upon all persons in her situation. The *Green* court further stated at page 632:

> "In recent years, the Supreme Court has developed what has been characterized as 'a rigid two-tier attitude' in equal protection cases. In most instances, statutory or regulatory classifications are presumptively constitutional and will not be disturbed *unless they are without rational basis*, resting *'on grounds wholly irrelevant to the achievement' of some permissible state purpose.*" (Citations omitted. Emphasis added.)
> "In other cases, however, where the classification is grounded on certain 'suspect' criteria,...or where the classification impinges upon certain 'fundamental' rights,...'strict' judifical scrutiny is required, and the classification will not stand unless justified by some 'compelling governmental interest.' (Citations omitted.)

Further the court said at pages 632, 633:

> "The Supreme Court, however, has not yet added sex to the list of suspect classifications...we accept arguendo the district court's assumption that *rational basis scrutiny is the appropriate standard of review in this case.*" (Citations omitted. Emphasis added.)

> "(T)he 'essential inquiry' in all equal protection cases is 'inevitably a dual one: What legitimate state interests does the classification promote? What fundamental personal rights might the classification endanger?"

Continuing further, the Court quoted from a decision rendered by this Court, 408 U.S. at 95, 92 S. Ct. at 2290:

> "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." (Citations omitted.)

And the *Green* court, *supra*, further quoted from another decision of this Court, 404 U.S. at 76, 92 S. Ct. at 254, on page 633 as follows:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having *a fair and substantial relation to the object of the legislation...*'." (Citations omitted. Emphasis was the Court's.)

Lastly, the *Green* court, *supra*, stated at page 634 that:

> "An equal protection argument requires careful analysis not only of the effect of the claimed discrimination but also of the degree to which the discriminatory classification furthers legitimate state interests."

Regardless of which test this Court now believes to be the proper basis of scrutiny, Respondent respectfully submits that the instant case does not sound of such a suspect classification as would require this Court to overturn the actions of Respondent. The Petitioner argues this selection is

based on sex as a classification, and that any classification which is based on sex, as well as race, or any other immaterial aspect, is immediately suspect. Respondent, however, respectfully submits that this is not a classification based on sex, but rather is a classification based on marital status, with sex being merely a subclassification of that larger class. Further consideration must be given the view propounded by many persons in the Petitioner's class, that they may now choose not to adopt the proposed equal rights amendment which may cure the present subclassification problem. At the present time, the required three-fourths of the soverign states have not adopted this amendment, and have not agreed to adopt such form of discrimination as an unlawful or a prohibited action. Until such time as the required three-fourths of the states adopt this amendment to the United States Constitution, such classifications and subclassifications may not be prohibited. Certainly there is a valid question as to how many persons in this nation actually believe this common law requirement of the Commonwealth of Kentucky (and the state of Alabama), to be an illegal form of discrimination.

An investigation into the beliefs of each female concerning this issue, whether married or not, would be truly determinative of what is to be discriminatory. An action which is expected, preferred, and relied upon by perhaps as many as eighty-five or even ninety percent of the persons within the class or subclass, and certainly more than one-half of these persons, is not discrimination; but would rather, in fact, be an unjust discrimination to overturn the relative security that this majority relies upon today. This country was founded upon the premise that a majority of the persons concerned with an issue should decide that issue for the entire group, with a sympathetic view to the rights of those persons who remain in the minority. Respondent

respectfully urges this court that the majority has decided this question from its prior two hundred years' history of rejecting any actions other than by adopting the husband's surname upon marriage. This has been done, and should continue to be done for the benefits of the society as a whole, which majority is entitled to equal protection of the laws as well. Those rights of the minority which must be viewed sympathetically by the majority, have been considered, and have been adequately protected by the Commonwealth of Kentucky in the passage of KRS 401.010, which allows those persons denied the equal protection of the laws, by operation of the common law, to change the effect of such law by regular, documented court actions, the cost of which is so small as to be described as nominal, and which returns any person to a class of whatever social status they may so desire.

Lastly, this subclassification of a married woman taking her husband's surname is further necessary for the benefit of succeeding generations, and the stability not only of these children, but for the stability of an ordered society. In order for any civilization to remain intact and stable, it becomes necessary for the combatants to lay down their arms, for all persons to respect the basic rights of humanity, and through laws which are, in fact, two edged swords, acquire further desirable rights at the cost of surrendering the lesser rights of total individuality. Thus, for the benefit of society in enforcing its laws, for the society to be able to lay and collect its taxes, and for society to allow a person to continue their usual transactions of everyday life, there must, of course, be administrative red tape of a very staggering amount. In order to insure that the basic inalienable rights are preserved for all, it becomes necessary to waive some of the lesser included rights, of which, the Petitioner's requested individuality is one. It is the belief of Respondent that such individuality must be sacrificed, temporarily, for the greater benefits to be derived from the accurate record keeping of governments, and the stability of the family unit. There must be some standards applied for keeping accurate records in order to make available valid information which must be relied upon. Social security numbers have become standard, but even they contain certain shortcomings. As an example, a property conveyance from 404-26-8194 to 400-64-8997 would be both novel and confusing to most of us, but this example is not used as an attempt to make light of the seriousness of Petitioner's argument; but rather is being used to demonstrate that record keeping is more reliable when certain standards are adopted and followed, such as requiring a married woman to use her husband's surname, at least until she petitions a county court and changes her name to something else. The validity of the family name is thereby assured, one researching a family name will know how to proceed, and court documents will reflect what this new name came from and will be recorded accordingly in public records. Such a requirement is not an "undue burden" upon Petitioner, when one considers that the alternative is to place the same burden upon all people who did intend to take the name of their husbands, and intended that all of the offspring of such marriage should have the same family name as that of the husband. An adequate remedy rests with the Petitioner by merely complying with the suggestion of KRS 401.010, and restoring her personal name at birth by her own public actions in a civil proceeding, thereby curing any significant disadvantage that may have resulted under the common law. The court may then determine during the proceeding what names should be used by both parties to the marriage, as well as any children which might be born after the marriage, and an eventual court settlement of the family name.

The Respondent, as Director of the Division of Driver

Licensing for the Commonwealth of Kentucky, is not the only administrator who will be faced with serious problems if this rule of law should be changed to allow a woman the freedom of choice of her surname upon marriage, without some constant public records to legally bind her to this decision. Respondent's problems will be minor when considered and compared to those of other governmental agencies. Consider the Kentucky Department for Human Resources, which keeps the records of each person born into the Commonwealth and establishes a family name for that person. KRS 199.570 requires a new birth certificate to be issued upon any adoption which involves a change of name. There is also a marriage license and ceremony certification record kept in the County Court Clerk's office for each new "family" created within the Commonwealth. This is required by KRS 402.020. KRS 401.010 and 401.040 further require the County Court Clerk to record each name change within the Commonwealth, have the record reflect the former name, and what the new legal name shall be from the date of the order granting the change of name. Furthermore, it is written in 57 Am. Jur. 2d, Name, § 11, page 282, that:

> "...The statutory method of changing one's name has distinct advantages: it is speedy and definite, and *provides a record by which the change of name is definitely and specifically established* and easily proved even after the death of all contemporaneous witnesses." (Emphasis added.)

Thus, one can readily observe that the logical approach for the Petitioner would be to pursue her state remedies by proceeding pursuant to KRS 401.010 and thereby providing an adequate record of such change for posterity. As to the nominal fees involved, the alternative costs of newspaper publication, and other means of creating a similar exposure would be just as

expensive, if not even more expensive. A very early case, *Isaac Rodley's Adm'r. v. Jack Morris*, 6 Ky. Opinions 151, 152 (1872), had this to say as regards public records:

> "The *interests of individuals*, as well as *the whole public, requires* that *public records should never be altered, or their veracity questioned* unless the power as well as the right to alter or amend is clearly shown." (Emphasis added.)

The marriage certificate, which indicates that the Petitioner and her husband were wed, does not indicate in what name they were joined, but only indicates that they were united in marriage. The phrase "united in marriage" seems to leave one with the impression that any married couple generally is of one common name; but because of custom, habit, and usage, that name has always been the surname of the husband. It appears for purposes of legality that another public record must necessarily be produced indicating that this fact is not so. All persons are now identified by a nine digit social security numbering system, and for all practical purposes, this has become a person's true identifier; but just as in the deed examples, one cannot correspond with another merely by using that nine digit number (which cannot be changed even after marriage.) Thus names are used because they are not as complex or impersonal. Respondent only requests that all persons who wish to change their names after marriage, do so in a legally and practical manner, which will assist all persons in guaranteeing to every other person those contractual rights due them by any society.

In the interest of the continuity and systematic record keeping, it is submitted that it is much more realistic, in view of custom and practice, to maintain the status quo and require the continued use of the husband's surname upon marriage, and to pursue the avenue of the court proceeding thereafter, for any further changes of the surname.

CONCLUSIONS

For the reasons stated herein above, it is submitted that the United States Court of Appeals for the Sixth Circuit was correct in its interpretations of the Kentucky common law, that the ruling of that Court was correct as to the questions raised by Petitioner, that the Petitioner has failed to establish any circumstances which would require certiorari to be granted in this case and, therefore, certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, JAMES M. RINGO, one of counsel for the Respondent, hereby certify that the foregoing Brief was served on the Petitioner, by depositing three copies of same in the United States mail, first class postage prepaid, on November 17th, 1976, addressed to all Counsel of Record for the Petitioner.

James M. Ringo

JAMES M. RINGO
Assistant Attorney General
Commonwealth of Kentucky